Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-265
	)	
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

REPLY COMMENTS OF BELL ATLANTIC

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REPLY COMMENTS OF BELL ATLANTIC[1]

1. **Introduction and Summary**

Having failed to block enactment of the 1992 Cable Act, the monopoly cable industry now seeks to perpetuate its bottleneck control over video programming by gutting the statute's program access provisions in the rulemaking process. As cable would construe it, the statute not only leaves undisturbed the restrictive business practices that Congress expressly condemned, but even places significant new obstacles in the path of prospective competitors seeking access to programming. Cable's construction tortures the plain meaning of the statute -- taking their cue from Humpty Dumpty, the

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

cable monopolists seem to believe that a word "means just what [they] choose it to mean -- neither more nor less."[2]

The statute's program access provisions are straightforward. First, the statute broadly prohibits any cable operator from engaging in any unfair competitive practice that impedes distributors' access to programming.[3] Second, in addition to this broad prohibition, the statute directs the Commission to issue regulations prohibiting, at a minimum, several enumerated practices that Congress considered per se unlawful.[4]

The cable industry's attack on the statute's provisions follows three basic themes. First, the incumbents attempt to turn the statute upside down, transforming it from a prohibitory enactment into one that affirmatively validates all but their most egregious practices. Second, in an exercise of interpretive gymnastics, they seek to evade the plain meaning of the enumerated prohibitions. Third, they fabricate a series of procedural hurdles that would make it nearly impossible for a complainant ever to challenge a particular unlawful practice.

The Commission must resist these efforts to dismantle the statutory scheme. Its regulations should

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2 Lewis Carroll, Alice Through the Looking-Glass, Chap. 6.

3 47 U.S.C. § 548(b).

4 47 U.S.C. § 548(c).

faithfully implement the statute's directive to prohibit the practices that Congress found have been used to impede competition. Only strict and vigilant enforcement of those prohibitions will foster the development of competing distribution systems, such as video dial tone, and the attendant increase in competing independent sources of programming.

2. The Commission Must Prohibit All Unfair Practices that Significantly Hinder Access to Programming

The first section of the statute's program access provisions, section 628(b), broadly prohibits all cable operator from engaging in any "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" any distributor from providing programming to consumers.[5] The cable incumbents' attempts to recast the plain terms of this provision are meritless.

a. The statutory prohibition applies to all cable operators regardless of vertical integration.

The cable monopolists argue that the broad statutory prohibition against unfair practices applies only to cable operators that are vertically integrated with programmers, and only if the unfair practice in some way furthers incentives

[5] 47 U.S.C. § 548(b).

resulting from vertical integration.[6] That contention simply ignores the plain language of the statute. The prohibition expressly applies to every "cable operator," without any limitation relating to vertical integration.[7] The statutory text leaves no room at all for the cable industry's restrictive construction.[8]

It is true, as the Commission observed,[9] that in delineating the minimum prohibitions to be included in the regulations under the second section of the statute's program access provisions, Congress focused principally on specific unfair practices committed by vertically integrated cable operators and programming vendors.[10] But there is no merit

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[6] See Comments of NCTA at 10-14; Comments of Time Warner at 6-8; Comments of TCI at 5; Joint Comments of Cablevision Industries Corp. et al. at 8.

[7] 47 U.S.C. § 548(b). The prohibition also applies to "a satellite cable programming vendor in which a cable operator has an attributable interest" and to any "satellite broadcast programming vendor." Id.

[8] Congress plainly understood that the practices requiring Commission oversight are not limited to vertical integration. As reflected in the provision regulating carriage agreements (1992 Cable Act § 12, adding new § 616 to the Communications Act), Congress believed that cable operators had used their market power to induce even independent programmers to engage in unfair and discriminatory practices. There is no reason to think that Congress would have wanted to insulate unfair practices from regulation just because they do not reflect an incentive specifically derived from vertical integration. See also S. Rep. No. 92, 102d Cong., 1st Sess. 24 (1991).

[9] See NPRM ¶ 8 n.18.

[10] See 47 U.S.C. § 548(c)(2).

to the cable companies' contention that the specific evils focused on in section 628(c) somehow circumscribe the general prohibition in section 628(b).[11]

The cable incumbents also try to convert the statute's broad prohibition against unfair practices from one that prohibits practices incompatible with the public interest into one that affirmatively blesses categories of questionable conduct. For example, cable argues that it is a complete defense to any charge of unfair practice that an independent programmer engages in the same practice.[12] That bizarre conclusion would frustrate the Congressional objectives. It would mean that if any independent programmer, for whatever reason, decided not to deliver its programming over an alternative transmission system such as video dial tone, it would provide a regulatory safe haven enabling a cable

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[11] Nor is there is any conceivable basis for the even more extreme suggestion that the general prohibition of section 628(b) has no content whatsoever beyond the Congressionally mandated minimum prohibitions of section 628(c). See Comments of Time Warner at 13.

[12] Comments of NCTA at 12; Comments of Time Warner at 8-9; Comments of TCI at 11-12.

operator to induce other programmers not to use a competing video dial tone system.[13]

In a similar vein, cable's argument that the prohibitions on unfair practices should apply only in geographical areas where vertical integration exists would open a gaping hole in the statutory protection.[14] Just because a vertically integrated company does not have an affiliated cable operator in a particular locality does not mean it cannot restrict the availability of programming there. Under the cable industry's theory, such a company would be free to direct its programming affiliate -- in every market in which it did not hold a cable franchise -- to refuse to deal with video dial tone operators or any other non-cable distribution systems. Because the cable incumbents control the bulk of the available cable programming, if this approach were followed by several vertically integrated companies it would cripple alternative distribution systems because they

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[13] Indeed, under the rule proposed by the cable companies, they would not even need to wait for the fortuity of such an action by an independent programmer. A cable operator (through exercise of its market power or other financial incentives) could induce an independent programmer to discriminate against a video dial tone user, and then rely on the independent programmer's actions to justify its own affiliated programmer's refusal to deal with video dial tone users.

[14] See Comments of Time Warner at 7-8; see also Comments of NCTA at 30-31 (arguing that prohibited discrimination must be between competing buyers in the same geographic market); Comments of TCI at 10-11; Comments of Viacom at 10-12.

would be denied access to significant programming in every market. This sort of unfair competition is just what the statute was designed to prohibit.

b. An unfair practice is prohibited if it impedes access to any programming; it need not foreclose access to all programming.

In a particularly strained interpretation, the cable incumbents assert that an unfair practice must do more than significantly hinder a distributor from obtaining access to particular programming; rather, it must hinder the distributor from providing any programming at all.[15] In other words, to be actionable, the practice must threaten the distributor's competitive viability.[16]

There is no foundation in the statute or the legislative history for this extreme construction, which would effectively nullify the general prohibition against unfair

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15 See Comments of NCTA at 9; Comments of Time Warner at 9-12; Comments of TCI at 30-32.

16 Indeed, even this remarkable revision of the statute is not extreme enough for the cable companies. They are at pains to point out that a mere showing by a distributor that an unfair practice was about to drive it out of business would not be sufficient to establish a statutory violation. Rather, the distributor would also have to prove that the unfair practice would threaten the "competitive viability" of any "well-run distributor." See Comments of Time Warner at 10-11.

practices.[17] If Congress had wanted to endorse all unfair practices by cable operators so long as they did not threaten to drive their competitors out of business, it certainly could have done so in less elliptical fashion. Instead, Congress prohibited any unfair practice that prevents or significantly hinders a distributor from gaining access to any programming, without regard to whether it impedes access to all programming.

3. The Commission Must Faithfully Implement the Statute's Per Se Prohibition of Specified Unlawful Conduct

In addition to the general prohibition of section 628(b), Congress identified in section 628(c) -- under the heading "Minimum Contents of Regulations" -- several types of conduct that the Commission's regulations must prohibit as *per se* unlawful.[18] The cable companies' efforts to effectively

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[17] The textual justification given for this contrived interpretation is particularly strained. One commentor observes that section 628(c)(2)(C) of the statute (47 U.S.C. § 548(c)(2)(C)) uses the phrase "such programming," referring back to the phrase "exclusive contracts for . . . programming" earlier in the subsection, *see* Comments of Time Warner at 10, n.8. It then argues that Congress's omission of the word "such" in section 628(b) indicates that Congress there was not referring to any particular programming but rather to the distributor's ability to provide any programming -- that is, to stay in business. This argument fails to explain, however, to what the missing "such" in subsection (b) is supposed to refer, since no particular programming is mentioned earlier in that subsection. In fact, inserting the word "such" as suggested would create a complete non sequitur.

[18] 47 U.S.C. § 548(c).

read these specific prohibitions out of the statute must be rejected.

a. The regulations must forbid the specified practices without requiring particularized showings of harm.

The cable companies argue that the statute's enumeration of specific forbidden conduct need not be taken seriously. In their view, the list does no more than define the term "unfair practices" for purposes of the statute's general prohibition. Whether a particular "unfair practice" violates the prohibition, they say, depends on the additional question whether it "hinders significantly" a distributor's ability to provide programming to consumers.[19] Under that approach, for example, a vertically integrated cable operator would be free to engage in conduct that Congress specifically prohibited -- such as concededly unjustified price discrimination among distributors -- unless a complaining distributor can show on a case-by-case basis that the discrimination has "hindered significantly" its ability to provide programming. This is an indefensible reading of the statute that would render meaningless the statutory list of prohibited conduct.

Not a single word in the Act suggests that the Commission's regulations are limited to defining the term

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[19] See Comments of NCTA at 7-10; Comments of Time Warner at 5-6.

"unfair practices." To the contrary, the statute expressly directs the Commission to "prescribe regulations to specify particular conduct that is prohibited."[20] "Prohibited" means "prohibited" -- not (as the cable monopolists would rewrite it) "prohibited only upon a further 'hinder significantly' showing by a complaining distributor." Likewise, Congress provided in unqualified terms that the regulations must "prevent" undue or improper influence, "prohibit" discrimination, and "prohibit" exclusive contracts.[21] This is the language of per se illegality. If the cable companies have their way, however, the regulations, rather than prohibiting the specified practices, would merely describe conduct that might be prohibited if a complainant could make a particularized showing of harm. Cable's version of the regulations would not meet the statute's "minimum" requirements and consequently would violate the Congressional directive.

b. Programming must be offered to competing distributors on the same terms unless cost or other economic differences justify price differentials.

The statute requires the Commission to prohibit vertically integrated programmers from "discriminati[ng] . . . in the prices, terms, and conditions of sale or delivery of"

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[20] 47 U.S.C. § 548(c)(1) (emphasis added).

[21] 47 U.S.C. § 548(c)(2)(A)-(D).

programming.[22] It identifies several specific exceptions to the prohibition, including differentials justified by "actual and reasonable differences in the cost of creation, sale, delivery, or transmission" of programming or by "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[23]

The cable companies argue that the economies of scale exception is intended "to permit volume discounts that a programming vendor cannot justify on the basis of specific cost differences."[24] They argue, in other words, that the statute makes volume discounts per se valid -- without regard to whether the differential is justified by any cost saving. That assertion is contradicted by the text and history of the statute.

The statutory language is clear in allowing price differentials based on the number of subscribers only when the programmer can show that it is taking into account some direct economic benefit reasonably attributable to the number of subscribers. The Conference Report explains that, although the House version of the statute originally allowed programmers to "grant reasonable volume discounts," the

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[22] 47 U.S.C. § 548(c)(2)(B).

[23] Id. § 548(c)(2)(B)(ii)-(iii).

[24] Comments of Time Warner at 27; see also Comments of Viacom at 18 n.12.

provision was amended by the conference.[25] The enacted version, "[i]n lieu of permitting volume discounts,"[26] permits programmers to establish price differentials if they are justified by "cost savings, or other direct and economic benefits reasonably attributable to the number of subscribers served by the distributor."[27] Thus, the cable companies are arguing for a rule that was explicitly rejected by Congress in the conference process. The statute as enacted absolutely prohibits price differentials unless they are justified by cost savings or similar considerations.[28]

The Commission must be particularly wary of the contention that programmers are automatically entitled to discriminate among distributors because of differences in the

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25 Conference Report at 92, 93.

26 Id. at 93 (emphasis added).

27 47 U.S.C. § 548(c)(2)(B)(iii).

28 As Congress apparently recognized in rejecting automatic volume discounts, subscriber volume will typically have little effect on a programmer's cost to deliver programming. The programmer's cost is generally already sunk, consisting of the cost of the content and the cost of satellite capacity that has already been leased. Little, if any, additional cost need be incurred to deliver the programming to another buyer.

buyers' "marketing" abilities, or name recognition.[29] This assertion is a prescription for perpetuating the market dominance of the cable incumbents, thereby frustrating Congress's desire to promote competition. An established cable operator can always claim that its name recognition gives it greater inherent marketing ability than a new entrant. If a programmer -- one that is vertically integrated with the established cable operator -- can use this claim to justify selling its programming to its affiliate at a more favorable rate, the new distributor will suffer a competitive

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[29] See Time Warner Comments at 23-24 & n.21. Because large cable operators have systems spread across the country, there is no necessary correlation between a programmer's marketing cost and the number of subscribers. For example, whether a programmer sells to one cable operator with 10 franchises of 100,000 subscribers each or to 10 different companies with 100,000 subscribers each, the program still must be marketed in each of 10 localities. As a result, if a programmer claims to have lower costs because a cable operator performs marketing on its behalf, or claims to have lower administrative costs from selling to a single large operator, the programmer should bear the burden of demonstrating a difference in its cost sufficient to justify a price differential. And to the extent a programmer "credits" a cable operator for any marketing performed on its behalf, the cable operator must not be entitled to credit greater than its actual cost to perform those activities.

disadvantage that creates yet an additional barrier to entry into the marketplace.[30]

Putting aside entirely the grounds upon which price differentials may be justified, the cable incumbents argue that there should also be a defined band of price differentials that will be presumed reasonable without any need for explanation.[31] In keeping with their general approach to the Act, they are not content with a procedure that will allow them merely to retain a competitive advantage over other distribution systems. Rather, the cable incumbents seek a procedure that will completely obliterate the anti-discrimination provisions. To that end, they argue for an enormous zone of presumptively permissible price differentials (ranging from 20%-30%) that would validate an unconscionable level of price discrimination.[32] One cable operator goes so far as to argue for a 30% band whose validity would be

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[30] Relying on a brief colloquy on the floor of the Senate, 138 Cong. Rec. S16,671 (daily ed. Oct. 5, 1992), the cable companies advance the related argument that programmers are free to sell at differential prices so long as the buyers' costs are different. See Comments of NCTA at 27; Comments of Time Warner at 24 n.21; Comments of Viacom at 15-16, 50. But both the statutory language and simple common sense make clear that a difference in the buyers' costs cannot justify a price differential unless they have a demonstrable impact on the seller's costs.

[31] See Comments of NCTA at 21-23; Comments of Time Warner at 28-30; Comments of Viacom at 19-20; Comments of Turner Broadcasting Co. at 13; Comments of TCI at 13.

[32] See Comments of Viacom at 19 (30%); Comments of Turner Broadcasting Co. at 13 (20%).

irrebuttable, no matter how strong the evidence of pure discrimination.[33]

Establishing even a narrow zone of presumptively permissible price differentials, however, would seriously threaten Congress's goals because it would have the effect of institutionalizing discriminatory pricing practices. The cable companies inevitably would take advantage of the zone by having their affiliated programmers accord them the full benefit of whatever price differential is designated by the Commission. The zone would provide regulatory cover for vertically integrated companies to perpetuate the very kind of price discrimination, and its attendant anticompetitive effects, that Congress prohibited.[34]

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[33] See Comments of Time Warner at 29-30. The breadth of this band is justified by observing that such a price range is "not unusual" in the industry and that it mirrors the full range of rates at which some programming is sold today. Id. at 30 n.24. That observation is a candid acknowledgment that the cable industry's position is designed to preserve the status quo. The fact is, however, that Congress determined that "business as usual" was discriminatory and anti-competitive, and it directed the Commission to take strong measures to change the status quo.

[34] Even assuming, as the cable industry claims, that some differentials do reflect genuine cost differences rather than discrimination, the regulatory system can still work smoothly without the mechanism of a predetermined band of reasonableness. In such cases, the cable operator should be able to readily demonstrate the necessary cost differences to justify the price differential.

c. Exclusive contracts must be prohibited except where the Commission determines in advance that a particular contract serves the public interest.

Emblematic of the cable industry's approach to the statute is its effort to invert the prohibition of exclusive contracts. The statute provides that, "with respect to distribution to persons in areas served by a cable operator," the Commission's regulations "shall . . . prohibit exclusive contracts . . . , unless the Commission determines . . . that such contract is in the public interest."[35] The provision plainly establishes a presumption against exclusive contracts -- they are unlawful except where shown in advance to serve the public interest. That reflects Congress's determination that exclusive contracts have been used perniciously by cable operators to "establish a barrier to entry and inhibit the development of competition in the market."[36]

The cable incumbents seek to turn the statutory presumption on its head. In their view, "most exclusive contracts promote rather than diminish competition and consumer welfare and, therefore, promote the public

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[35] 47 U.S.C. § 548(c)(2)(D) (emphasis added).

[36] Senate Report at 28. While recognizing that "exclusivity can be a legitimate business strategy where there is effective competition" (id. (emphasis added)), Congress specifically found that there is no effective competition in most localities. 1992 Cable Act § 2(a)(2), (4).

interest."[37] They argue that the Commission's regulations should embody a presumption in favor of exclusive contracts and, indeed, should designate some categories as "per se valid."[38] But the Commission does not sit as an appellate body to review and reconsider the findings of Congress. The cable incumbents lost their fight on Capitol Hill; the Commission must not allow them to override the legislative judgment by substituting an inverted presumption that results in the statutory exception swallowing the rule. Fidelity to the Congressional directive requires a strong regulatory presumption against exclusive contracts, subject to a cable operator's opportunity in a particular case to demonstrate that a specific contract serves the public interest.[39]

In a variation on its theme, the cable industry proposes that the regulations validate exclusive contracts --

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[37] Comments of NCTA at 44; see also Comments of Time Warner at 43; Comments of Viacom at 36-37; Comments of TCI at 23-30.

[38] Comments of Time Warner at 44.

[39] The Commission should reject the cable incumbents' invitation to declare exclusive contracts for new programming per se lawful. See Comments of Time Warner ar 44; Comments of TCI at 28-29. Even if there are circumstances where an exclusive arrangement might promote development of new programming, it can still have impermissible anticompetitive effects. For example, if new programming turns out to have mass appeal, an exclusive arrangement with an affiliated cable operator would put a fledgling competing distributor at a severe disadvantage. Given the special considerations that may bear on individual cases, there is no reason to broadly exempt exclusive contracts for new programming from the prior approval requirement that the statute mandates for all such arrangements.

without the need for a prior public interest determination by the Commission -- subject only to a post hoc complaint mechanism.[40] But the statute specifies that an exclusive contracts is prohibited unless the Commission "determines" that it is in the public interest. That places the burden on the contracting parties to seek a prior public interest determination, not on an injured party to complain about such a contract after the fact. In the absence of a specific FCC determination that it serves the public interest, an exclusive contract is flatly unlawful and cannot be validated retroactively by way of a complaint proceeding.[41]

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[40] See Comments of Time Warner at 42.

[41] The statute provides limited grandfathering protection to a specified class of exclusive contracts -- those that grant exclusive distribution rights with respect to satellite cable programming and that were entered into on or before June 1, 1990. 47 U.S.C. § 548(h)(1). There is no basis for the cable companies' aggressive claims that none of the statutory prohibitions apply to practices rooted in any contract entered into prior to the statute's enactment or the effective date of the Commission's regulations. See Comments of NCTA at 34-37; Comments of Time Warner at 31-35; Comments of TCI at 16-18; Comments of Viacom at 28-35. Congress made crystal clear the precise reach of its grandfathering provision. Any effort to extend such protection more broadly simply disregards the Congressional determination.

This does not mean that the contracts in question are nullified, only that they cannot serve as a defense to a claim of prohibited practices. For example, a programmer cannot justify discrimination in favor of its affiliated cable operator by pointing to a contract entered into with its affiliate after June 1, 1990. The programmer can comply with both the contract and the statute by offering its programming to competitors at the same price at which it sells to its affiliate. That result does not infringe on any legitimate cable interests, and it is plainly compelled by the terms of the statute.

4. **The Commission Must Establish Procedures That Afford A Fair Opportunity to Challenge Unfair Practices**

The cable monopolists' obvious hostility to the statute's substantive protections for programming access underscores the need for procedures designed to permit strict and vigorous enforcement of the Commission's rules. The cable companies, by contrast, seek to thwart the Congressional objectives by placing insurmountable procedural barriers in the path of challenges to unfair practices. Unless the Commission rejects these suggestions, the detailed statutory prohibitions will describe an unenforceable regulatory scheme having little practical importance.

Typical of the cable industry's approach is its effort to impose on a complaining party the burden of presenting, in its complaint, what amounts to conclusive evidence of a violation, all without the benefit of any discovery.[42] But the program access abuses that Congress outlawed occur in the dark. Only the most unsophisticated cable operator or programmer would openly advertise its exclusive contracts or other discriminatory activities.

It should be enough for a distributor simply to show, for example, that it has had difficulty obtaining programming acquired by another distributor or that the rates or terms that a programmer has offered appear to be less

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[42] See Comments of Time Warner at 46-47; Comments of Viacom at 20-23.

favorable than those extended to competitors. Such allegations of disparate treatment should give rise to a presumption that a cable operator or programmer has violated the statute and shift the burden to the defendant to justify its activities.[43]

[43] See Joint Comments of Bell Atlantic and the Pacific Companies at 9-11. In order for competing distributors to know whether they have been subject to disparate treatment, moreover, the Commission's rules must require cable operators to make informational filings publicly disclosing the rates, terms, and conditions under which they obtain their programming.

CONCLUSION

The Commission should promote competition in the distribution and production of video programming by strictly enforcing the prohibitions on unfair practices contained in the 1992 Cable Act's program access provisions.

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February 16, 1993

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Reply Comments of Bell Atlantic" was served this 16th day of February, 1993 by first class mail, postage prepaid, to the parties on the attached list.

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